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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
ENERGY DIVISION
ID #4946
RESOLUTION E-3941
October 27, 2005

R E S O L U T I O N

Resolution E-3941. Pacific Gas and Electric Company (PG&E) requests authority to establish a Department of Energy Litigation Balancing Account (DOELBA) to track incremental legal costs and proceeds associated with litigation concerning the United States Department of Energy's failure to take delivery of spent nuclear fuel from PG&E's nuclear power plants. Approved with modifications.

By Advice Letter 2666-E-A, filed on May 25, 2005.

SUMMARY

This Resolution approves with modification PG&E's request to establish the DOELBA balancing account. The purpose of the account is to record litigation costs and proceeds stemming from PG&E's litigation with the United States Department of Energy (DOE) for DOE's failure to accept delivery of and take title to spent nuclear fuel from Diablo Canyon (Diablo) and Humboldt Bay Unit 3 (Humboldt) nuclear power plants. Major elements of this resolution are summarized below.

- PG&E is authorized to deduct "incremental litigation costs" from the proceeds recovered.
- "Incremental litigation costs" include external litigation fees and costs incurred for this litigation. Costs internal to PG&E such as in-house counsel and litigation support are not included.
- Incremental litigation costs shall be deducted from the proceeds recovered from successful litigation.
- Net proceeds after deduction of incremental litigation costs will be used to offset expenditures for onsite dry cask storage systems for spent nuclear fuel to date.

- PG&E shall file an application, instead of an advice letter for the Commission to determine the disposition of the DOELBA balance.
- PG&E shall clarify its tariffs to define “incremental litigation costs”.

BACKGROUND

PG&E filed a complaint against DOE in the Federal Court of Claims on January 22, 2004, alleging that DOE breached its contract with PG&E under which DOE agreed to accept delivery of and take title to, the spent nuclear fuel from Diablo and Humboldt beginning on January 31, 1998. PG&E was required to enter into these contracts with DOE as a condition of its Nuclear Regulatory Commission licenses. The federal framework applicable to all nuclear power plants provides that the federal government shall establish a national repository (now planned to be located at Yucca Mountain in Nevada) for long-term storage of spent nuclear fuel.

The Federal Court of Claims has determined the DOE breached the spent fuel contracts with other nuclear utilities.

The Federal Court of Claims has already determined that DOE breached the spent fuel contracts in cases involving other nuclear utilities. Given these developments in other cases, it appears that the issue of DOE’s liability to PG&E for breach of contract has been effectively resolved. The issue left to be litigated in the PG&E lawsuit is the amount of damages that PG&E is entitled to recover as a result of the DOE breach. PG&E has retained outside legal counsel to pursue these damages.

PG&E seeks recovery from the DOE for the construction and operation of dry cask storage systems for spent nuclear fuel and other damages.

PG&E has asserted, among other things, that it will need to build dry cask storage facilities for spent nuclear fuel at Diablo and Humboldt as a result of DOE’s failure to take the spent fuel on time, and that the cost of designing, constructing and operating these facilities as well as other damages should be recoverable. If successful in recovering the costs of the dry cask storage facilities and other damages, PG&E proposes to credit ratepayers with the proceeds net of incremental litigation costs.

NOTICE

Notice of Advice Letter (AL) 2666-E-A was made by publication in the Commission's Daily Calendar. PG&E states that a copy of the advice letter was mailed and distributed in accordance with Section III-G of General Order 96-A.

PROTESTS

Advice Letter AL 2666-E-A was not protested.

DISCUSSION

Energy Division has reviewed PG&E's AL 2666-E-A and believes it contains appropriate mechanisms for PG&E to seek recovery of costs and damages resulting from failure of DOE to accept delivery of and take title to spent nuclear fuel. The litigation has sufficient potential for ratepayer benefits and we encourage PG&E to pursue it.

PG&E ratepayers have paid DOE \$294.3 million to date for accepting spent nuclear fuel.

Through PG&E rates, ratepayers have been paying the DOE \$0.001/kWh for a waste repository for spent nuclear fuel since 1984 for Diablo and since approximately 1988 for Humboldt. As of June 30, 2005, payments to DOE have been \$289.2 for Diablo and \$5.1 million for Humboldt, totaling \$294.3 million.

PG&E requested and the Commission approved funds in its last general rate case to procure dry cask storage containers and to construct an on-site facility to house the spent nuclear fuel.

The spent fuel pool at Diablo is nearly full, a direct consequence of the DOE failing to accept spent nuclear fuel since 1998. PG&E requested and the Commission approved funds in its last general rate case to procure dry cask storage containers and to construct an on-site facility to house the spent nuclear fuel.

PG&E recovers costs associated with dry cask storage for Diablo through rates established in its general rate case. These costs are estimated to total \$139.3 million through 2015.

Humboldt is currently in a custodial non-operation mode called SAFESTOR, and will undergo full decommissioning beginning in 2009. Humboldt cannot be decommissioned without first removing the spent nuclear fuel in its fuel pool. Dry cask storage and facility costs are being met with decommissioning trust funds set aside for Humboldt (see Resolution E-3912), estimated to total \$70.3 million through 2015.

While damage claims have not been fully formulated, PG&E states that the claims will include the costs of the dry cask storage systems.

The incremental litigation costs requested under PG&E AL 2666-E-A are for external, non-PG&E legal costs.

These costs include attorney's fees, discovery, depositions, document production services, and outside experts, and are related to PG&E's damages suit regarding Diablo and Humboldt. In response to an Energy Division data request, PG&E advises that its incremental litigation costs exclude costs internal to PG&E, such as in-house counsel and litigation support. PG&E represents that it expects to incur \$8.5 million in external litigation expenses.

PG&E shall modify its tariffs proposed in AL 2666-E-A to clarify that "incremental litigation costs" are defined as external, non-PG&E legal costs..

This and other modifications we require are specified in the Ordering Paragraphs of this Resolution.

The DOELBA will record incremental litigation costs and proceeds.

The Department of Energy Litigation Balancing Account (DOELBA) will track and record incremental litigation costs and proceeds recovered through this litigation. The DOELBA will expire when the Commission has authorized the crediting or debiting of the balance to the proper mechanism to ensure the net benefits are returned to ratepayers through base rates associated with Diablo

Canyon under PG&E's next GRC, or in the case of Humboldt, to its nuclear decommissioning trust fund.

PG&E should file an application for the disposition of the DOELBA balance. Since the potential damage award is so significant, use of the advice letter process is not appropriate.

PG&E has requested that disposition of the DOELBA be handled by advice letter. Since the litigation costs and proceeds for Diablo and Humboldt involve two different funding sources – general rate case rates and nuclear decommissioning trust funds – and since the potential damage award is so significant, use of the advice letter process for disposition is not appropriate.

PG&E shall modify its DOLEBA tariff to state that PG&E shall file an application to determine the disposition of the balance. In this way we ensure a complete review of the amounts that PG&E records in this account before the amounts are reflected in rates, including a review of the reasonableness of the litigation costs, if needed. The Commission and parties will have an opportunity in a formal proceeding to conduct a thorough review of all entries to the account, including litigation costs which shall be “incremental”. The tariff changes that we require are set forth in the Ordering Paragraphs.

The Commission supports PG&E's initiative to recover funds from DOE on behalf of ratepayers. Therefore we allow PG&E the opportunity to recover incremental litigation costs that it records in the DOLEBA after their review in a formal proceeding initiated by a PG&E application. We expect the proceeds of the litigation to considerably exceed the incremental litigation costs such that there will be a benefit to ratepayers.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Accordingly, the draft resolution was issued for comment no later than 30 days prior to being considered by the Commission.

FINDINGS

1. PG&E filed a complaint against the United States Department of Energy (DOE) in the Federal Court of Claims on January 22, 2004, alleging that DOE breached its contract with PG&E under which DOE agreed to accept delivery of and take title to, the spent nuclear fuel from Diablo and Humboldt beginning on January 31, 1998.
2. PG&E was required to enter into DOE contracts as a condition of its Nuclear Regulatory Commission licenses.
3. The federal framework applicable to all nuclear plants provides that the federal government shall establish a national repository (now planned to be located at Yucca Mountain in Nevada) for long-term storage of spent nuclear fuel.
4. The Federal Court of Claims has determined the DOE breached the spent fuel contracts with other utilities.
5. PG&E seeks recovery of the costs for dry cask storage facilities at Diablo Canyon and Humboldt Bay Unit 3 nuclear power plants and other damages.
6. PG&E ratepayers have paid DOE \$294 million to take delivery of spent nuclear fuel.
7. Containment and storage issues for Diablo and Humboldt have resulted since the DOE has not taken delivery of spent nuclear fuel on time.
8. Dry cask storage systems for Diablo and Humboldt have been approved by the Commission.
9. Incremental litigation costs incurred are for external, non-PG&E legal costs.
10. The DOE Litigation Balancing Account should record incremental litigation costs and proceeds recovered through this litigation.

11. External litigation fees incurred for this litigation shall be deducted from the proceeds recovered.
12. Net proceeds recovered from successful litigation should offset current expenditures for onsite dry cask storage systems for spent nuclear fuel and other damages.
13. PG&E should file an application to review the disposition of the DOELBA balance.
14. PG&E should modify the DOELBA as proposed in AL 2666-E-A to define “incremental litigation costs” as set forth in this Order.
15. PG&E should modify the DOELBA as proposed in AL 2666-E-A to state that disposition of the balance will be determined in a formal Commission proceeding as set forth in this Order.

THEREFORE IT IS ORDERED THAT:

1. The request of the Pacific Gas and Electric Company to establish a DOE Litigation Balancing Account as requested in Advice Letter 2666-E-A is approved with modifications set forth in this Order.
2. PG&E shall modify its proposed DOELBA to state that it shall file an application to determine the disposition of the balances recorded in the account, and to clarify the meaning of “incremental litigation costs”. Specifically PG&E shall make the following tariff revisions:
 - a. Preliminary Statement Part DZ.3. addressing the Revision Date shall be modified to read: “Disposition of the balance in the account shall be determined by a Commission decision addressing PG&E’s proposed disposition of the balance, which shall be filed as an application.”
 - b. Preliminary Statement Part DZ.6. addressing the Department of Energy Litigation Cost Subaccount (DOELC) shall be modified to add the following sentences: “Incremental litigation costs shall include the costs PG&E incurs for outside counsel, expert witnesses,

document and discovery services, and other charges to PG&E specifically associated with work done by outside counsel for PG&E on PG&E's lawsuit against DOE filed in the Federal Court of Claims on January 22, 2004. The costs of PG&E's Law Department directing the litigation shall not be recorded in the DOELC."

3. Within 7 days of today's date, PG&E shall file a supplement to AL 2666-E-A to make the tariff revisions required by this Order. The supplement shall replace AL 2666-E-A in its entirety and shall be effective on today's date subject to Energy Division determining that it is in compliance with this Order.
4. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on October 27, 2005; the following Commissioners voting favorably thereon:

STEVE LARSON
Executive Director